RECENT CASES.

AGENCY — LIABILITY OF PRINCIPAL FOR ACTS OF INDEPENDENT CONTRACTOR — LANDOWNER'S LIABILITY TO INVITED PERSON. — The defendant, owning a park, engaged a company to give an exhibition of fireworks to which the public were charged admission. The details of the work and the men who performed it were entirely under the control of the company. During the exhibition the plaintiff, one of the spectators, was injured by a rocket negligently discharged by one of the workmen. *Held*, that the defendant is not liable, as the damage was caused by the negligence of an independent contractor. *Deyo* v. *Kingston, etc., R. R. Co.*, 94 N. Y. App. Div. 578.

It is a well-recognized rule of law that an employer is not liable for the acts of an independent contractor. *King* v. *New York, etc., R. R. Co.*, 66 N. Y. 181. On the other hand, one who invites others to come upon his premises must use due care to render them reasonably safe, and cannot avoid this duty by the employment of an independent contractor. *Curtis* v. *Kiley*, 153 Mass. 123. Hence, where the work is of a dangerous nature, the landowner must not only use reasonable care in the selection of the contractor, but he must also see that due precautions are taken to prevent harm. The ground of liability is not the negligence of the contractor, but that of the landowner in failing to keep his premises in a reasonably safe condition. *Thompson* v. *Lowell, etc., Ry. Co.*, 170 Mass. 577. In the present case, the only question appears to be whether the defendant was in fact negligent; for the exhibition was not of such a hazardous nature as to render him liable irrespective of negligence. *Cf. Sebeck* v. *Plattdeutsche, etc., Verein*, 64 N. J. Law 624.

AGENCY — LIABILITY OF PRINCIPAL TO THIRD PERSON IN TORT — STOCK CERTIFICATE FORGED BY SECRETARY OF COMPANY. — The secretary of a company borrowed money from the plaintiff for his own purposes, as the latter knew, and gave as security an alleged certificate of shares in the company. The certificate was apparently regular in form and was countersigned by the secretary as required; but the company's seal was fraudulently affixed and the directors' signatures were forged. The secretary absconded and the plaintiff sues the company for refusal to register the shares. *Held*, that the company is not estopped to deny the validity of the forged certificate, nor responsible for its officer's wrongful act. *Ruben* v. *Great Fingall Consolidated*, [1904] 2 K. B. 712.

It is English law that to make the principal liable in such a case the fraud must be committed by the agent not merely in the apparent scope of his employment, but also for the benefit of the principal. *British Mutual Banking Co.* v. *Charnwood*, 18 Q. B. D. 714; *George Whitechurch, Ltd.* v. *Cavanagh*, [1902] A. C. 117. The United States Supreme Court has shown a tendency toward the English doctrine. See *Friedlander* v. *Texas, etc., Ry.*, 130 U. S. 416. But general American law does not require that the fraud be for the principal's benefit. *New York, etc., R. R.* v. *Schuyler*, 34 N. Y. 30; *Tome* v. *Parkersburg Branch R. R.*, 39 Md. 36. This, it is submitted, is the sounder view: the motive of the wrongdoer seems immaterial on the question of the liability of the person who has given him power so to harm another. The court in the present case seems content with the English doctrine, but the same result would probably be reached in this country. Under the American rule only a *bona fide* purchaser without notice is protected. And one buying, as in this case, from the agent, known to be acting for himself, is accordingly without remedy against the principal, as the circumstances should put him on inquiry as to the title of the agent. *Moores* v. *Citizens' National Bank*, 111 U. S. 156; *Farrington* v. *South Boston R. R. Co.*, 150 Mass. 406.

ASSIGNMENTS FOR CREDITORS — MARSHALING ASSETS — SURRENDER OF SECURITIES. — The plaintiff having lent to the defendant's assignor ten thousand dollars, and received as collateral security notes held by the debtor, petitioned for its share of the dividends declared after the general assignment. *Held*, that the plaintiff may surrender the collaterals and share in the distribution upon its entire claim, or deduct the face value of the security from the debt and receive dividends upon the balance. *Union & Planters' Bank of Memphis* v. *Duncan*, 36 So. Rep. 690 (Miss.).

The decision is opposed to the result reached in a majority of jurisdictions, though the cases are in conflict. See *Merrill* v. *National Bank of Jacksonville*, 173 U. S. 131;

Wurtz v. *Hart*, 13 Ia. 515. The holder of collateral security does not by accepting it surrender his primary right against the debtor personally. When the debtor makes a general assignment, the personal right is converted into an equitable claim against the assets in the hands of the assignee, which remains equally distinct from the right against the security. *Paddock* v. *Bates*, 19 Ill. App. 470. Hence the creditor should be permitted to collect dividends upon his entire claim and to supply any deficiency out of the proceeds of the collaterals. Should the dividends plus the proceeds exceed the amount of the debt, the creditor will hold the balance in trust for the assignee. See *Græff's Appeal*, 79 Pa. St. 146. If in consequence the secured creditor recovers his entire claim while other creditors do not, this is but the natural result of foresight in obtaining security. Statutes, however, in some jurisdictions require the surrender of collaterals as a condition to receiving dividends upon the whole claim. See *Swedish-American National Bank* v. *Davis*, 64 Minn. 250.

BILLS AND NOTES — DELIVERY — ACCOMMODATION PAPER DISCOUNTED BY OTHER THAN PAYEE. — The defendant executed an accommodation note payable to a certain bank for the purpose of enabling a friend to raise money by having it discounted. The bank having refused to discount it, the plaintiff was induced to do so. The latter brought suit upon the note in his own name. *Held*, that the plaintiff may recover. *Bull* v. *Latimer & Helm*, 80 S. W. Rep. 252 (Tex., Civ. App.).

The result of the principal case is open to the technical objection, deemed fatal in many jurisdictions, that the note in the hands of the plaintiff is really not a valid instrument, since it has never been delivered to the payee. *First National Bank of Centralia* v. *Strange*, 72 Ill. 559. Some courts, however, hold that it is desirable to let the plaintiff recover on the note, because, the object of the note being merely to raise money, it must ordinarily be immaterial to the maker by whom it is discounted. Accordingly a number of jurisdictions allow recovery, but require the suit to be brought in the name of the payee. *Bank of Rutland* v. *Buck*, 5 Wend. (N. Y.) 66. If recovery is to be allowed at all in such a case the Texas court seems logical in allowing the plaintiff to bring the action in his own name; for the bank having refused to discount the note can have no more property in it than the plaintiff, and so no technical consistency is gained by requiring the action to be brought in its name.

CARRIERS — PERSONAL INJURIES TO PASSENGERS — INSULTS BY SERVANT. — The defendant's conductor refused to return to the plaintiff her change, and abused her in the presence of her fellow-passengers. *Held*, that the plaintiff may recover for mental humiliation. *Gillespie* v. *Brooklyn Heights R. R. Co.*, 178 N. Y. 347.

For a discussion of the principles involved, see 15 HARV. L. REV. 670.

CARRIERS — WHEN A CARRIER BECOMES WAREHOUSEMAN. — The plaintiff, a consignee of certain goods carried by the defendant company, lived outside of its delivery limits. The goods were stolen after the plaintiff had made arrangements to have them removed, but before a reasonable time for their removal had elapsed. *Held*, that the defendant company is liable. *Burr* v. *Adams Express Co.*, 58 Atl. Rep. 609 (N. J., Sup. Ct.).

The law of New Jersey upon this point has previously been regarded as unsettled. This decision, however, seems to place that state squarely among the jurisdictions holding that liability as a common carrier continues until the consignee has had a reasonable time to remove the goods. See 9 HARV. L. REV. 153.

CONFLICT OF LAWS — RIGHTS OF PROPERTY — VALIDITY OF FOREIGN CHATTEL MORTGAGES. — A debtor executed a chattel mortgage to the plaintiff in Illinois which was duly recorded in that state. The property was taken into Tennessee and there levied upon by local creditors of the mortgagor. The plaintiff brought replevin. *Held*, that the defendant cannot be charged with constructive notice of the mortgage and is entitled to priority. *Snyder* v. *Yates*, 79 S. W. Rep. 796 (Tenn.).

The position taken by the Tennessee court that a mortgage recorded in another state is not effective against creditors attaching property which has been brought into Tennessee, seems to reverse the stand previously taken by that state on this question. See *Bank* v. *Hill*, 99 Tenn. 42. The holding of the court is supported by several states. *Corbett* v. *Littlefield*, 84 Mich. 30. The majority of decisions however, take the view that a chattel mortgage validly executed and recorded according to the requirements of the state where made, is valid in every state into which the property may be brought, against purchasers or attaching creditors, unless contrary to some rule of statutory or common law policy. *Parr* v. *Brady*, 37 N. J. Law 201. Against this view it may be urged that a recording statute can have no force outside of the jurisdiction enacting it and that creditors of a foreign state having no access to the record cannot be charged

with notice. The answer to this would seem to be that since by the statute of the state having jurisdiction of the *res* the chattel mortgage passed title good against third parties, that title should be protected wherever found.

CONSTITUTIONAL LAW — PERSONAL RIGHTS — BREACH OF CONTRACT OF SERVICE MADE INDICTABLE. — A statute was enacted in Alabama making it a penal offense for any laborer who should make a written contract of service and then abandon his employment without the consent of his employer and without sufficient excuse, to make a similar contract with a second party without informing him of the previous agreement. *Held*, that the statute is unconstitutional under the Constitution of Alabama and under that of the United States. *Toney* v. *State*, 37 So. Rep. 332 (Ala.).

For a discussion of the principles involved, see 17 HARV. L. REV. 121.

CONSTITUTIONAL LAW — RIGHT TO TRIAL BY JURY — PROTECTION AFFORDED BY THE FOURTEENTH AMENDMENT IN CRIMES AGAINST THE STATE. — By a state statute the recorder of Macon was authorized to sentence summarily certain municipal offenders to not more than six months on the county chain gang, a body composed of felons and municipal offenders, and used for labor on the public works. The petitioner being accordingly condemned to serve on such chain gang applied to the federal court for a writ of *habeas corpus*. *Held*, that the writ should be granted, since the statute providing for the infliction of such punishment without a jury trial is unconstitutional. *Jamison* v. *Wimbish*, 130 Fed. Rep. 351 (Dist. Ct., S. D. Ga.). See NOTES, p. 136.

CONSTITUTIONAL LAW — VESTED RIGHTS — PUBLIC OFFICE. — *Held*, that an officer appointed for a definite time to a public office has not a vested property interest therein, or contract right thereto, of which the legislature cannot deprive him. *Mial* v. *Ellington*, 46 S. E. Rep. 961 (N. C.).

This decision overturns a long line of cases in North Carolina and brings the law of that state on the point involved into harmony with the law prevailing in the rest of the Union. See 14 HARV. L. REV. 218.

CONSTRUCTIVE TRUSTS — MISCONDUCT BY NON-FIDUCIARY — TITLE ACQUIRED BY MURDER HELD SUBJECT TO CONSTRUCTIVE TRUSTS. — A wife held a policy of insurance on the life of her husband, payable to her if she should survive, otherwise to his representatives. The husband murdered the wife and then killed himself. Her representatives sought to recover the proceeds of the policy from his representatives, who had received it, by agreement, subject to this suit. *Held*, that they are entitled to recover. *Box* v. *Lanier*, 79 S. W. Rep. 1042 (Tenn.).

For a discussion of the questions of title and of equitable interest involved, see 9 HARV. L. REV. 474; 14 *ib.* 375.

CORPORATIONS — FOREIGN CORPORATIONS — WHAT CONSTITUTES DOING BUSINESS. — The plaintiff, a foreign corporation, having sold to the defendant some machinery through an order taken and filled by its local agent, sued on a note given for the purchase price. *Held*, that the single transaction constitutes a doing of business, within the statute barring corporations doing business in the state from maintaining an action without having obtained a certificate. *John Deere Plow Co.* v. *Wyland*, 76 Pac. Rep. 863 (Kan.).

As the Kansas court points out, the usual statement, that the doing of a single act of business does not constitute the doing or carrying on of business within the meaning of statutes requiring certificates, has generally been made in reference to isolated and incidental transactions. See *Cooper Mfg. Co.* v. *Ferguson*, 113 U. S. 727; *Commercial Bank* v. *Sherman*, 28 Ore. 573. The suggestion here advanced that where the single transaction indicates a purpose to carry on a substantial part of the corporation's dealings within the state, the certificate must be obtained, seems sound. If this were not so, any corporation would be entitled to complete at least one transaction without obtaining a certificate, however clear and indisputable its intention to carry on business in the state regularly thenceforward. This would conflict with the legislature's intent to protect citizens in all their dealings with foreign corporations. See *Farrior* v. *New England, etc., Co.*, 88 Ala. 275. The practical difficulty of determining whether the single transaction evidences a purpose to engage in business permanently, is one of fact purely, and is properly for the jury. *Oakland Sugar Mill Co.* v. *Wolf Co.*, 118 Fed. Rep. 239.

DEATH BY WRONGFUL ACT — STATUTORY LIABILITY — DAMAGES. — An action was brought under a statute providing for the recovery of damages by the widow or personal representative of a person killed through negligence or default. *Held*, that

though mortality tables may be produced to assist the jury in estimating the decedent's expectancy of life, they may not be used to show the probable duration of the life of the plaintiff, widow of the decedent. *Emery* v. *Philadelphia*, 208 Pa. St. 492.

The general rule under similar statutes is that the damages recoverable are those suffered by the beneficiaries, not the loss to the decedent's estate. *Rajnowski* v. *Detroit, etc., R. R. Co.*, 74 Mich. 20. Under Lord Campbell's Act, the jury apportion the sum recovered among the beneficiaries according as each has been damaged. The Pennsylvania statute, like those of most states, provides for its distribution among the beneficiaries in proportion as they would take the decedent's personalty in case of intestacy. The inconsistency arising under this mode of distribution, of allowing a recovery based on the damage to the several beneficiaries, and then dividing the whole arbitrarily, has been noted. *Richardson* v. *New York, etc., R. R. Co.*, 98 Mass. 85; *Richmond* v. *Chicago, etc., R. R. Co.*, 87 Mich. 374. This consideration leads the court in the present case to base the damages solely on the husband's expectancy, independently of the fact that the wife's may be much shorter, and her loss consequently less than the damage done to the decedent's estate. By general authority elsewhere, damages are based on the joint expectancy of the two. *Hall* v. *Germain*, 14 N. Y. Supp. 5. On examination of the Pennsylvania decisions it would appear that the court, in striving for consistency, has deviated from established precedent to avoid a hypothetical complication concerning only the distribution of the damages and not necessarily involved in the main issue. *Cf. Caldwell* v. *Brown*, 53 Pa. St. 453; *Mansfield Coal & Coke Co.* v. *McEnery*, 91 Pa. St. 185.

DEEDS — DELIVERY IN ESCROW — SUBSEQUENT SALE BY GRANTOR BEFORE HAPPENING OF CONTINGENCY. — A father, in consideration of the release of a debt, made a deed of land to his daughter, which he delivered to a stranger to give to the daughter upon his death. Subsequently the father made a grant of the same land to the defendant, who knew all the facts. After the father's death, the daughter brings this action to quiet title. *Held*, that the plaintiff is entitled to relief, since title is in her by relation from the time of delivery. *Emmons* v. *Harding*, 70 N. E. Rep. 142 (Ind., Sup. Ct.). See NOTES, p. 138.

EQUITY — JURISDICTION — REMOVAL OF CLOUD ON TITLE ACQUIRED UNDER STATUTE OF LIMITATIONS. — *Held*, that equity will not grant a decree confirming the title to land claimed by possession under the statute of limitations. *Miller* v. *Robertson*, 24 Can. L. T. 205 (Can., Sup. Ct., April, 1904).

This decision can be reached only on the ground that adverse possession does not ripen into title, for where one is in possession and has title a bill *quia timet* will lie. *Holland* v. *Challen*, 110 U. S. 15, 20. It seems now generally recognized that one in possession for the statutory period gains an undisputed legal title. *Scott* v. *Nixon*, 3 Dr. & War. 388. For most purposes, the statute should not be regarded as merely stripping the owner of all remedy. It extinguishes his title and vests it in the adverse possessor. It is against the very purpose of statutes of limitations, in their nature statutes of repose, to deny a bill for the destruction of the existing paper title. *Arrington* v. *Liscon*, 34 Cal. 365. The present case seems clearly wrong on theory and is against overwhelming authority. In accord are only two jurisdictions. See *McCoy* v. *Johnson*, 70 Md. 490; *Contee* v. *Lyon*, 19 D. C. 207. The argument that whether title was, in fact, acquired through adverse possession is properly determinable at law ought to have no weight. If only equity can afford relief, it is no objection that a question of fact must be decided.

EQUITY — JURISDICTION — WINDING UP A BENEFIT SOCIETY. — Employees of a company formed a voluntary association for the payment of sick benefits and old age pensions out of the dues. The society was neither incorporated nor registered. After the company ceased business, the association gained no new members so that its funds became unequal to the increasing liabilities, present and contingent. A majority of the members accordingly voted for a dissolution by the court and commenced for this purpose an action in equity in which all classes of members were represented. *Held*, that equity has jurisdiction. *In re Lead Company's, etc., Society*, [1904] 2 Ch. 196.

This jurisdiction is not rested on the equity jurisdiction for the dissolution of partnerships, because a benefit society is not a partnership, since it has neither the purpose nor the incidents of one. See *Flemyng* v. *Hector*, 2 M. & W. 172. Nor is the jurisdiction confined to relief against the fraud or the illegal acts of the officers, nor to societies where the funds are held in trust for the members. See *Atnip* v. *Tennessee Mfg. Co.*, 52 S. W. Rep. 1093 (Tenn.). The basis of the jurisdiction is the recognized purpose of equity to protect property rights which have no adequate protection at law.

See *Rigby* v. *Connol*, L. R. 14 Ch. D. 482, 487. In the principal case it was apparent that the society was steadily losing assets; that, if the pensions were continued, the contingent rights of the younger members would be worth nothing; in short that the society was insolvent and could no longer fulfil its mission. The court gave the only adequate protection to the property rights of the members, — a winding up of the society. Most of the law of friendly societies is comparatively modern and unsettled, but this jurisdiction of equity is supported by the few authorities in point. See *Pearce* v. *Piper*, 17 Ves. 1; *Reeve* v. *Parkins*, 2 Jac. & W. 390.

ESTOPPEL — ESTOPPEL IN PAIS — FAILURE TO ACT. — The plaintiffs, bankers in Toronto, discounted a note purporting to bear the defendants' signature and placed the proceeds to the credit of the holder. On the same day that the defendants, merchants in Montreal, received from the plaintiffs a notice to provide payment at maturity, the plaintiffs paid out the proceeds of the discount. If the defendants had wired notice that the signature was a forgery this payment would have been stopped, but a letter sent in due course would have been too late. *Held*, that since the defendants did not telephone or send a telegram, they are estopped to assert the forgery. *Ewing* v. *Dominion Bank*, 40 Can. L. J. 468 (Can., Sup. Ct., June, 1904). See NOTES, p. 140.

EVIDENCE — DECLARATIONS CONCERNING BODILY CONDITION. — The plaintiff was injured in a railroad collision. Evidence was offered that a witness who was not a physician had heard him say with his hands on his head, "Oh, if I could only get rid of these headaches." *Held*, that the evidence is admissible. *Cashin* v. *New York, etc., R. R. Co.*, 185 Mass. 543.

Evidence of statements of present physical suffering is generally admitted when the physical condition of the person making the statement is in issue, and evidence of statements of past suffering is generally excluded. *State* v. *Fournier & Co.*, 68 Vt. 262. This rule is not universal, however, and in a few states no evidence of assertions of pain is admitted unless the assertions were made to a physician. *Davidson* v. *Cornell*, 132 N. Y. 228. In Massachusetts and a few other jurisdictions, evidence of statements of past suffering is admitted when the statements were made to a physician. *Roosa* v. *Boston Loan Co.*, 132 Mass. 439. In the principal case, since the statement was not made to a physician, the admission of the evidence had to be rested solely on the ground that it was a statement of present suffering. Although no authority directly in point has been found, the court seems to have been justified in holding that it was admissible on that ground. The statement necessarily carried with it an idea of past suffering as proof of which the evidence would be inadmissible; but since it also clearly referred to present pain it was not on that account objectionable.

EXECUTORS AND ADMINISTRATORS — DUTIES — LIABILITY FOR DEFAULT OF COEXECUTOR. — One of two joint executors received certain checks in discharge of a mortgage debt due the estate, and another debt was paid to him in cash. He forwarded both checks and cash to his coexecutor, who represented himself as having opportunity to make an investment to better advantage. The latter cashed the checks, kept their proceeds and the money received, and later became insolvent. *Held*, that the executor who originally received the checks is not liable to the estate for their proceeds, but is liable for the cash received and turned over to his coexecutor. *In re Johnson*, 87 N. Y. Supp. 733.

In cases of joint administration, each executor has power over the whole of the estate. He is therefore not liable for waste or misappropriation by his coexecutor of funds which the latter collected. *Duncan* v. *Davison*, 40 N. J. Eq. 535. But for that part of the estate which he himself collects he is responsible, and cannot ordinarily evade liability by turning the funds over to a coexecutor. *Langford* v. *Gascoyne*, 11 Ves. Jun. 333. In New York, however, it is held that receipt of a check is not receipt of the money, and that the executor who cashes the check is alone responsible. *In re Provost*, 87 N. Y. App. Div. 86. This distinction seems difficult to support. The executor who receives the check can, and ordinarily should, present it for payment and hold the proceeds for the estate; how by turning the check over to his coexecutor he escapes the responsibility which would attach to him if he cashed it and remitted the proceeds, it is hard to see. And it would seem that in this particular a check is like a bond or note, for which an executor under such circumstances is liable. *Townsend* v. *Barber*, Dick. 356; *Edmonds* v. *Crenshaw*, 14 Pet. (U. S.) 166.

FEDERAL COURTS — RELATION OF STATE AND FEDERAL COURTS — EFFECT OF DECISION OF STATE COURT ON THE VALIDITY OF A STATUTE UNDER THE STATE CONSTITUTION. — *Held*, that where rights have been fixed under a contract before an

adjudication by the state courts upon the validity of a statute under the state constitution, the federal courts may declare a statute valid which the state courts have declared void. *Great Southern, etc., Co.* v. *Jones*, 24 Sup. Ct. Rep. 576. See NOTES, p. 134.

FRAUDULENT CONVEYANCES — TRANSFERS FOR VALUE — COVENANT IN CONSIDERATION OF MARRIAGE TO CONVEY ALL AFTER-ACQUIRED PROPERTY. — By an ante-nuptial settlement a man settled property on his wife and children and covenanted to convey on similar trusts all property, except business assets, which he should acquire during the joint lives of himself and wife. Later, after giving notice of suspension of payment, he conveyed a house and furniture worth £17,000 to the trustees of the settlement and soon after was adjudicated a bankrupt. *Held*, that the conveyances are not void under Stat. 13 Eliz. c. 5, against fraudulent conveyances. *Re Reis, Ex parte Clough*, 23 Law Notes 169 (Eng., C. A.).

It is well settled that from the point of view of bankruptcy proceedings marriage is a good consideration for a conveyance. *Fraser* v. *Thompson*, 1 Giff. 49; *Tolman* v. *Ward*, 86 Me. 303. Nor can creditors avoid a conveyance in pursuance of an ante-nuptial agreement to settle a fixed sum. *Ex parte McBurnie's Trustees*, 1 DeG. M. & G. 441; *Kinnard* v. *Daniel*, 13 B. Mon. (Ky.) 496. But it has always been supposed that such a contract, to be valid against creditors, was limited to what was reasonable under all the circumstances. See *Ex parte McBurnie's Trustees, supra; Goldsmith* v. *Russell*, 5 DeG. M. & G. 547. An earlier case is opposed to the present decision, holding a contract to convey all future-acquired property void against creditors as contrary to the plain reason and policy of the law, whether made with actual intent to defraud or not. *Ex parte Bolland*, L. R. 17 Eq. 115. The earlier decision seems preferable. In spite of the exception of business assets from the operation of the contract, the decision reached in the present case would allow a business man practically to exclude his future creditors from realizing upon his estate. The argument sometimes advanced that such a contract may be specifically enforced is not conclusive against the right of third parties to avoid it. *Seymour* v. *Wilson*, 19 N. Y. 417.

HIGHWAYS — INJURIES FROM OBSTRUCTIONS — LIABILITY OF PERSONS OBSTRUCTING FOR INJURIES TO PASSERS-BY. — The defendant unlawfully obstructed the sidewalk by placing large boxes upon it, in passing which the plaintiff slipped on vegetable matter dropped by a third person, and fell. But for the defendant's obstruction, she would probably not have stepped where she did. She sues the defendant for injuries caused by the fall. *Held*, that the plaintiff may recover. *Garibaldi and Cuneo* v. *O'Connor*, 112 Ill. App. 53.

In the present case, the court seems to create a new liability on the part of a person who unlawfully obstructs the sidewalk. The effect of the decision is to impose upon him an absolute liability to passers-by for injuries caused by its condition. No other case has been found which goes to this extent. The authorities cited by the court seem to be based upon the ground that the obstruction was the proximate cause of the injury. *Cf. Murphy* v. *Legett*, 164 N. Y. 121. In the principal case, however, the unlawful obstruction maintained by the defendant was at most only a *causa sine qua non;* and it is clear that, generally speaking, the commission of an act without which the injury would not have occurred is not enough, in itself, upon which to base a liability. It therefore seems that in the absence of authority in support of the doctrine enunciated, the court might fairly have refused to hold the defendant liable.

INJUNCTIONS — ACTS RESTRAINED — NUISANCES. — The defendant had erected enormous blast furnaces at great expense. These furnaces were continually throwing out ore dust which fell upon the plaintiff's property in large quantities, creating a nuisance. *Held*, that a permanent injunction will issue to restrain the defendant from so using its furnaces. *Sullivan* v. *Jones and Laughlin Steel Co.*, 57 Atl. Rep. 1065 (Pa.).

This decision seems, in effect, to overrule an earlier Pennsylvania case and to place that state among the jurisdictions which, in issuing a permanent injunction, disregard the fact that it will damage the defendant far more than it will benefit the plaintiff. *Cf. Richards's Appeal*, 57 Pa. St. 105. The plaintiff's remedy at law in these cases is plainly inadequate. In most jurisdictions he is put to repeated actions for damages which fail to compensate him, and in all he is left unable to prevent the virtual taking of his property for the private purposes of the defendant. Notwithstanding this, the cases in accord with the earlier decision hold that the injunction is a matter of grace, and as such should not be granted where it is against the balance of convenience. *Huckenstine's Appeal*, 70 Pa. St. 102. This result amounts to a grant of immunity to a person who has made a sufficiently expensive outlay on the instruments of his tort.

The recent decision seems to take the better view, that a plaintiff having shown a continuing nuisance, can demand the injunction as of right. *Hennessy* v. *Carmony*, 50 N. J. Eq. 616.

LIBEL AND SLANDER — PRIVILEGED COMMUNICATIONS — PUBLIC DOCUMENTS. — The defendant handed to a third person a defamatory report concerning the plaintiff contained in an official copy of a Senate document. *Held*, that any use of such a document is absolutely privileged. *De Arnaud* v. *Ainsworth*, 32 Wash. L. Rep. 662 (D. C.). See NOTES, p. 142.

MORTGAGES — MERGER OF INTERESTS — DISCHARGE OF THE OBLIGATION. — A testator devised mortgaged property to certain beneficiaries. The executor paid the mortgage debt and took an assignment of the bond and security. Thereafter he assigned them to a third party who brought a bill of foreclosure. *Held*, that by the payment, the mortgage and bond are discharged, and the assignee acquired no right. *Hetzel* v. *Easterly*, 96 N. Y. App. Div. 517.

On the principle that the security follows the obligation, courts have held that payment of the debt by the debtor discharges the mortgage and leaves the mortgagee nothing which he can assign. *Brown* v. *Lapham*, 3 Cush. (Mass.) 551; *Androscoggin Savings Bank* v. *McKenney*, 78 Me. 442. It would seem, however, that since a mortgage gives an interest *in rem*, a merger, destroying the legal interest of the mortgagee, could occur only when the estates of the mortgagor and mortgagee are united in one person. See *Mickles* v. *Townsend*, 18 N. Y. 575, 582. Accordingly a *bona fide* purchaser of the mortgaged property, from an assignee of the mortgage who has fulfilled an obligation to pay the debt for the benefit of the mortgagor's estate, is protected. See *Real, etc., Co.* v. *Rader*, 53 How. Pr. (N. Y.) 231. Again, the extinguishment of the claim by the statute of limitations does not discharge the mortgage. *Norton* v. *Palmer*, 142 Mass. 433. In neither case could the holder of the mortgage be protected if the pledge were released upon the discharge of the obligation. The true doctrine would seem to be that the one bound to pay the debt must, upon getting the security, hold it in trust for the mortgagor. The same result would be reached in the principal case, since the assignee from the executor was not an innocent purchaser.

MORTGAGES — PRIORITIES — PRIORITY OF RECORDED ASSIGNMENT OF MORTGAGE OVER UNRECORDED ASSIGNMENT. — *Held*, that an assignee of a mortgage debt who received the bond is postponed to a later assignee who received the mortgage deed and was prior in recording his assignment. *Syracuse Savings Bank* v. *Merrick*, 96 N. Y. App. Div. 581. See NOTES, p. 135.

NEGLIGENCE — DUTY OF CARE — LIABILITY OF THIRD PARTY FOR INJURIES TO TRESPASSER. — The defendant company allowed a wire on the land of a third party to remain charged with electricity, without his permission. The property in the wire, which had been broken and was hanging near the ground, was in the landowner. In playing on the premises, as children of the neighborhood occasionally did, the plaintiff touched it and received a shock. *Held*, that the defendant is liable. *Daltry* v. *Media, etc., Co.*, 208 Pa. St. 403.

As a general rule a trespasser cannot recover from a landowner for injuries caused by the unsafe condition of the premises. *Sullivan* v. *Boston, etc., Co.*, 156 Mass. 378. But in the present case, he was allowed to recover from a third person who was responsible for their dangerous condition. The court based its decision upon the ground that as the defendant had no right in the premises, he was on an equal footing with the plaintiff, and could not plead an owner's exemption from liability. The case appears to be sound. On principle, the fact that the plaintiff was a trespasser seems insufficient to excuse the defendant from the liability which he would otherwise have incurred. The ultimate reason for exempting a landowner from liability in such a case seems to be the public policy of allowing him to make the most beneficial use of his land — a reason that obviously does not operate to excuse the present defendant.

OFFER AND ACCEPTANCE — REVOCATION — NECESSITY OF COMMUNICATION. — The plaintiff, who was in possession of the defendant's land under a lease with an option to purchase, forfeited the lease and was evicted by a purchaser from the defendant. The plaintiff later notified the defendant that he accepted the offer to sell contained in the original option, and upon the defendant's refusal to convey brought a bill for specific performance against the defendant and his vendee. *Held*, that the lease having been forfeited, the option remains as a mere revocable offer, and cannot be made into a binding contract by the plaintiff's acceptance after knowledge of the conveyance to another. *Frank* v. *Stratford-Handcock*, 77 Pac. Rep. 134 (Wyo.). See NOTES, p. 139.

PATENTS — INJUNCTION AGAINST ACTS CONTRIBUTING TO INFRINGEMENT. — The defendants were engaged in manufacturing certain component parts of an article patented by the plaintiff which they sold to parties who were engaged in infringing the patent. The plaintiff sought to restrain the defendants on the ground of infringement. *Held*, that the defendants are not guilty of infringement even though they know the parts are used in infringing the patent. *Dunlop, etc., Co.* v. *Moseley & Sons*, 91 L. T. R. 40 (Eng., C. A.).

The American and English decisions on the question raised by the principal case are in square conflict. According to the English view, the owner of a patent has no right against one knowingly selling component parts to a person who uses them in infringing the patent. *Townsend* v. *Haworth*, cited in *Sykes* v. *Howarth*, 12 Ch. D. 826, 831. Under the American rule, a manufacturer of a component part of an article which he knows is to be used in infringing the patent, is liable as a contributory infringer. *Wallace* v. *Holmes*, 9 Blatchf. (U. S.) 65. Under the English view, it would seem that some irresponsible person might get manufacturers to furnish different parts to be used by him in infringing the patent. Against such a person damages would be inadequate and an injunction would be the only remedy. After he was enjoined, some other such person could continue the performance with the manufacturers. There seems to be no valid objection against holding one who is thus furnishing the means of infringement and is reaping part of the benefit, accountable to the patentee. The American rule justly grants the needed protection to the holder of the patent.

POLICE POWER — REGULATION OF BUSINESS — CHARGES OF EMPLOYMENT AGENCIES. — A statute made it unlawful for an employment agent to receive as compensation more than 10 *per cent* of the first month's wages in the employment furnished. *Held*, that the statute is not within the police power, and contravenes the constitutional guarantee of protection to property. *Ex parte Dickey*, 77 Pac. Rep. 924 (Cal.).

The constitutional right to make contracts is not unlimited, and interference by the police power seems increasing. Limitations may be imposed where public health or safety is concerned, and in business affected with a public interest so as to be virtually a monopoly, charges may be fixed. *Munn* v. *Illinois*, 94 U. S. 113. A conflict, however, exists as to the state's right to interfere to prevent oppression where people only nominally on an equality are contracting. Thus weekly payment acts and "truck acts" have been sustained. *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13; see *Opinion of the Justices*, 163 Mass. 589. Other courts have denounced them as destroying the constitutional liberty of contract. *Republic, etc., Co.* v. *State*, 160 Ind. 379; see *Vogel* v. *Pekoc*, 157 Ill. 339. Usury laws, the validity of which is unquestioned, look toward the prevention of oppression doctrine, but the argument is weakened by the fact that historically they are restrictions on a privilege, and that they existed before the Constitution. Employment agencies do not seem within the doctrine of Munn *v.* Illinois *supra*. It is true they may be regulated to prevent fraud. *Price* v. *People*, 193 Ill. 114. But as to fixing rates the present decision seems correct; the doctrine of protection from oppression, if valid at all, seems one to be strictly confined if everybody is not to be put under legislative tutelage.

RESTRICTIONS AND RESTRICTIVE AGREEMENTS AS TO USE OF PROPERTY — ENFORCEMENT OF RESTRICTIONS — SUIT BY INTERMEDIATE LESSOR. — The plaintiff assigned to the defendant a lease subject to negative covenants by the plaintiff, and the defendant agreed to perform the covenants and to indemnify the plaintiff against them. After the defendant disregarded a restriction, but before action by the plaintiff's lessor, the plaintiff sought a mandatory injunction to have the premises restored. *Held*, that the plaintiff is not entitled to relief. *Harris* v. *Boots, etc., Co. Ltd.*, [1904] 2 Ch. 376.

The plaintiff's lessor could have proceeded against either the plaintiff or the defendant on the covenants, or against the defendant in equity. *Tulk* v. *Moxhay*, 2 Ph. 774. But as between the plaintiff and the defendant, the defendant should bear the ultimate burden, because he alone has the benefit and control of the land and he alone commits the breach. The plaintiff is, therefore, entitled to enforce the defendant's covenant to the extent of indemnity or exoneration. But this right did not arise in the principal case because he needed no assistance, for his liability had not been fixed by any act of his lessor. See *Ranelaugh* v. *Hayes*, 1 Vern. 189. Has the plaintiff, then, any right on the covenant independant of indemnity? No other case has been found, but the negative answer of the court seems correct. See *In re Poole and Clarke's Contract*, [1904] 2 Ch. 173. He has parted with all interest in the land; derives no benefit from the restrictions; suffers no loss from the breach. He resembles in this a warrantor of title to realty, whose right to sue previous warrantors is restricted to indemnity. *Booth* v. *Starr*, 1 Conn. 244.

RESTRICTIONS AND RESTRICTIVE AGREEMENTS AS TO USE OF PROPERTY — IMPLIED RIGHT OF COVENANTOR TO SIMILAR COVENANTS FROM HIS PURCHASER. — On a statutory summons under a contract for the sale of land subject to restrictive covenants, the question was whether the purchaser was bound to covenant to perform the covenants and to indemnify his vendor against breaches of them, as the vendor had covenanted with his grantor. *Held*, that the purchaser must so covenant but for no purpose other than strict indemnity. *In re Poole and Clarke's Contract*, [1904] 2 Ch. 173.

This obligation can be imposed only by finding it in the contract of the parties. It is not expressed, but, in the light of the circumstances, it may perhaps be fairly implied. *Moxhay* v. *Inderwick*, 1 De G. & Sm. 708. The parties know that each is bound to the previous owner; that the vendor, after the sale, loses all personal interest in the restrictions; and that ultimately the defendant should bear the burden, since he alone uses and controls the land and commits the breach. This brings the case within the rule of some English text-writers, applied to the sale of land subject to mortgage, that whenever the vendor is personally subject to liabilities in respect of the estate or for the performance of which the estate is security, his purchaser must undertake the liabilities and covenant to indemnify the vendor against them. See 1 DART, VENDORS AND PURCHASERS, 6th ed., 628; *Adair* v. *Carden*, 29 L. R. Ir. 469. In the United States, where the vendee rarely executes the deed, it would be much more difficult to imply such an obligation on the vendee as the principal case imposes. No case on the point has been found. *Cf. Fiske* v. *Tolman*, 124 Mass. 254.

SALES — WARRANTY — REMEDY FOR BREACH OF WARRANTY OF TITLE. — The defendant sold personal property to the plaintiff, agreeing to furnish a good title. The latter, while still in the undisturbed possession of the property, sued for breach of this covenant of title. *Held*, that the plaintiff cannot recover substantial damages without showing she has been disturbed in her possession or otherwise injured by such defect of title. *Barnum* v. *Cochrane*, 77 Pac. Rep 656 (Cal.).

The question when a warranty of title is so broken as to give a cause of action is in square conflict, but the view taken by the court, that the vendee can sue only after he has been dispossessed or otherwise injured, is supported by the weight of authority. *McGiffin* v. *Baird*, 62 N. Y. 329. Some courts, however, uphold the other position that the vendee is entitled to sue at once. *Grose* v. *Hennessey*, 13 Allen (Mass.) 389. The former view seems the better on principle, as under the latter a vendee might recover full damages at once for failure of title when, if never dispossessed, his damage would be only nominal. Furthermore under this latter theory the vendee might be barred by the statute of limitations, although he were unaware of any defect in his title until his remedy was lost. The present decision requiring actual dispossession follows the analogy in the law of real property that a covenant of warranty is not broken until there has been an actual ouster. *Gilman* v. *Haven*, 11 Cush. (Mass.) 330.

SPECIFIC PERFORMANCE — STATUTE OF FRAUDS — PART PERFORMANCE WITHOUT A CHANGE OF POSSESSION. — The plaintiff built a house on his land in reliance on the oral promise of the defendant to buy the land when the house was completed. The defendant having refused to carry out his agreement the plaintiff brought a bill for specific performance. *Held*, that the plaintiff is entitled to a decree. *Dickinson* v. *Barrow*, [1904] 2 Ch. 339. See NOTES, p. 137.

TORTS — LIABILITY FOR ACT OF AGENT — LESSOR AND LESSEE RAILROADS. — The appellee, a switchman in the employ of a company operating the line of the defendant railroad under a lease, was injured in the course of his duty through the negligence of the lessee in furnishing defective appliances. Suit was brought against the lessor railroad. *Held*, that the defendant is liable. *Chicago, etc., Ry. Co.* v. *Hart*, 209 Ill. 414.

The lessor railroad has often been held liable, in the absence of statutory exemptions, for torts against the public due to the negligent operation of its line by the lessee. *Singleton* v. *Southwestern R. R. Co.*, 70 Ga. 464. The basis of such decisions is the requirement, founded on public policy, that the common carrier be held to the proper exercise of its chartered powers and obligations with respect to the public, considering the lessee the agent of the lessor in the discharge of those duties. Between the lessee's servant and the lessor no interdependent relation such as exists between the public and the lessor is established either by charter or by voluntary contract. Consequently most courts rightly regard the lessee as an independent contractor with the employee, and refuse to charge the lessor with the employer's negligence toward him. *East Line, etc., Ry. Co.* v. *Culberson*, 72 Tex. 375. The principal case seems to find support only in North Carolina. *Logan* v. *North Carolina R. R. Co.*, 116 N. C. 940.

But for injuries resulting from defects in the roadbed, stations, and premises leased, the lessor is quite generally responsible to employees and to the public alike. *Lee* v. *Southern, etc., R. R. Co.*, 116 Cal. 97.

TORTS — PERSONAL RIGHTS — LIABILITY OF PROPRIETOR OF PUBLIC RESORT FOR INSULT TO GUESTS. — The defendant owned and maintained a park used as a place of public resort. One of its servants mistook the plaintiff for a woman of ill repute, and requested her to leave. No publication of defamatory matter was charged, and the employee, as well as the defendant's manager, apologized almost immediately. *Held*, that every person not a member of a proscribed class, has a right to be free from insult and personal indignities in a public resort, and that the plaintiff may recover for the mental humiliation which she suffered. *Davis* v. *Tacoma, etc., Co.*, 77 Pac. Rep. 209 (Wash.).

No court has gone so far as to recognize a general right to be free from insults causing only mental suffering. See *Reed* v. *Maley*, 74 S. W. Rep. 1079 (Ky.); *Prince* v. *Ridge*, 66 N. Y. Supp. 454. The establishment of such a right would render useless the limitations of the law of libel and slander, and open wide the door to fraudulent litigation. The Washington case must be regarded as an attempt to extend the liability of the owner of property toward invited persons. The most that a host has been held for hitherto is physical injury to guests from the dangerous condition of the premises; and to enlarge his responsibility as suggested would make his position unduly difficult. Furthermore, it would seem for the public good that the proprietors of public resorts should not be held to act at their peril in ejecting obnoxious persons. The responsibility of railroads for insults to passengers by employees does not furnish a conclusive argument by analogy, for the rule in those cases is founded on the peculiar law of carriers, a class within which street railway parks do not fall. See *Purcell* v. *Daly*, 19 Abb. New Cas. 301; *Gillespie* v. *Brooklyn Heights R. R. Co.*, 178 N. Y. 347.

TRIALS — APPEAL — RIGHT TO REVIEW FACTS IN ELECTION CONTESTS. — In a suit brought to contest the defendant's election, the trial judge found for the defendant. An appeal was taken on the ground that the decision of the trial judge as to matters of fact was erroneous. *Held*, that the judgment be reversed. *Shields* v. *McMahan*, 81 S. W. Rep. 597 (Tenn.).

In reviewing the findings of fact, the appellate court merely applied the rule that obtains in equity appeals. *Cf. French* v. *Gibbs*, 105 Ill. 523. Generally, however, in election contests, the decision of the judge on findings of fact, like the verdict of a jury, is not subject to review. *Jones* v. *Glidewell*, 53 Ark. 161. And at law, cases in which a judge has by consent of the parties tried the facts, are treated in the same way. *Case, etc., Co.* v. *Soxman*, 138 U. S. 431. In refusing to follow these authorities, the court bases its decision upon the consideration that in election contests the judge is required by law to try the facts, and traces an analogy to equity procedure. The analogy appears to be real and affords strong support to the case. The result may also be defended on the ground that by withdrawing the ultimate determination of the issue as far as possible from the influence of local politics, it tends to decrease the danger, especially great in these cases, of a prejudiced decision. But it may be questioned whether these reasons justify the court in deciding against the weight of authority.

WILLS — CONSTRUCTION — PROVISION AGAINST CONTEST. — The testatrix, by a will containing a provision that any legatee contesting it should forfeit his legacy, made a bequest to the appellee. The latter unsuccessfully contested the probate of the will. *Held*, that as the legatee had reasonable cause for contesting the will, he is not barred by the forfeiture clause. *In re Friend's Estate*, 58 Atl. Rep. 853 (Pa.).

Although the point raised by this case is in some conflict, the result reached seems eminently desirable. Against the case it may be urged that it apparently violates the express wishes of the testatrix. But to decree an absolute forfeiture in every case would work injustice. If a legatee reasonably believes that a will was procured by undue influence, he ought not to be forced to contest it at his peril. Furthermore if, reasonably thinking that a part of the will was inserted by mistake without the testator's knowledge, or that it is a forgery and so not entitled to probate, he contests it on that ground, he should not be deprived of his legacy. To enforce the forfeiture in such cases would frequently have no other effect than to aid dishonest persons in reaping the benefit of their wrong. On the other hand, the rule holding a forfeiture clause operative only where the contestant has not probable cause for his suit, would still discourage the bringing of vexatious suits, which, after all, is ordinarily the real purpose of the testator. *Cf. Jackson* v. *Westerfield*, 61 How. Pr. (N. Y.) 399.